Written Testimony of Roger K. Warren, Scholar-in-Residence, Judicial Council of California, Administrative Office of the Courts, and Project Director, National Center for State Courts National Sentencing Reform Project

Little Hoover Commission
Public Hearing on Sentencing Reform
Thursday, June 22, 2006
State Capitol, Room 437

I. Sentencing Reform from a National and Judicial Perspective

1. There is no judicial responsibility that state trial judges take more seriously than the sentencing of felony offenders.
    a. Felony cases involve those offenses creating the most serious injury and harm to persons, property, and civil society, warranting the most severe punishments as well as the greatest diligence in protecting public safety.
    b. The handling of felony cases (cases involving crimes punishable by imprisonment) consumes a greater proportion of judicial resources than the handling of any other type of case. Felony cases are entitled to preference on a court's trial calendar, and the conduct of jury trials, the most time-consuming of all judicial functions, is dominated by the trial of felony cases.
    c. Although judges never make the initial charging decisions in criminal cases, and only rarely decide questions of guilt or innocence (bench trials constitute less than 1% of all felony case dispositions), their singular, unique, and most important responsibility in the handling of criminal cases is sentencing the offender.
    d. Judges are the only persons authorized by law to sentence, i.e. to punish or incarcerate an offender for criminal conduct.
    e. Every California prison inmate and parolee was initially committed to the jurisdiction of the California Department of Corrections and Rehabilitation (CDCR) by a judge.

2. In performing this important judicial responsibility, judges are guided, of course, by the law: the sentencing statutes, rules, guidelines, and cases.

3. To the extent judges have discretion under the law, however, judges typically seek to fit an appropriate sentence to the crime in light of the particular nature and circumstances of the crime, its impact on others and the community, the known characteristics of the offender, and the corrections alternatives available.
    a. In assessing the "fitness" of potential alternative sentences, the degree of "blameworthiness" or wrongdoing on the part of the offender is normally paramount in the judge's mind. Punishment in the form of "just deserts" (getting what one deserves) is therefore normally the primary consideration in the mind of the sentencing judge, serving, in effect, to

limit the sentencing options available, to set a range of acceptable options of varying severity.

b. Within that range, in my experience, public safety is then the next most important consideration, consisting of efforts to influence the offender's future behavior, or the future behavior of other potential offenders, through, for example, incapacitation, deterrence, or rehabilitation.

c. Other goals and considerations relevant to sentencing are usually subsidiary.

4. Over the last 30 years, there have been three situations that have frequently served to diminish the effectiveness of judicial sentencing:

   a. First, where sentences absolutely mandated by legislation are fundamentally inconsistent with a judge's own professional judgment, not permitting the judge to impose the sentence that best fits the crime, as described above. A primary example of such mandatory sentences is a provision requiring a judge to imprison an offender, or to imprison an offender for a specified minimum term, even under circumstances where the judge feels such a sentence fails to properly fit the crime—and is therefore "unjust"—or is ineffective in promoting public safety. Mandatory sentences also have the effect of transferring judicial discretion to determine appropriate sentencing outcomes to prosecutorial agencies whose charging decisions often limit the available sentencing options. This effect is the source of some frustration because courts and corrections officials are often better suited by role in the criminal justice system, qualifications, and experience to determine the sentence that best fits the particular circumstances of a specific offense and individual offender.

   b. Second, where none of the corrections options available provide an appropriate fit, because, for example, they do not include appropriate "intermediate punishments" (punishments between probation and imprisonment) that satisfy "just deserts," or the type of services or treatment that are likely, or more likely, to be effective in reducing recidivism and promoting public safety.

   c. Third, where the judge has insufficient information about either the offender or the various corrections alternatives available to make a rational sentencing decision, to exercise his or her sentencing discretion in a thoughtful, reasoned manner.

5. Although, generally speaking, judges have not actively sought to address the first situation described in 4.a. above, state court justices and judges have been actively involved across the country during the last 15 years in bringing together community leaders from law enforcement, prosecution, criminal defense, probation, and treatment-providing agencies to address the latter two situations. Frustrated by the "revolving door" syndrome, the criminal justice system's ineffectual response to repeat offenders, state court judges have led the national effort to create, maintain, and expand "problem-solving courts" designed to

address the unmet treatment needs of such offenders. These problem solving courts (drug courts, mental health courts, domestic violence courts, DUI courts, and the like) seek to provide greater fairness, promote public safety, and reduce recidivism by obtaining the necessary information and establishing the necessary corrections programs to address offenders' underlying problems of addiction, mental illness, and domestic violence. "Problem-solving courts," or "collaborative justice courts" as they are often called here in California, have been hugely popular across the country at the local, state, and national level and have been very successful in many jurisdictions in reducing recidivism and the costs associated with the criminal justice system.

6. Unfortunately however, in most jurisdictions problem-solving courts are quite limited in the scope of their operations—handling only a small portion of the overall felony caseload. Moreover, on a national scale over the last 30 years sentencing and corrections policy has moved in the opposite direction favoring imprisonment over other forms of punishment, and over treatment, individual fairness, public safety, restitution and rational sentencing practices.

7. Today, therefore, judges are asking why we are so wedded to our prevailing policies. They are asking whether there isn't a better way. On the front line every day, judges often observe that current sentencing practices may appear tough, but they aren't necessarily smart: they are ineffective in promoting public safety, reducing recidivism, or providing restitution to victims; they are unnecessarily costly; and they are sometimes unfair.
    a. The persistent preference on the part of many policy makers to respond to every corrections failure with ad hoc prescriptions of more and longer terms of imprisonment for broad categories of offenders isn't working.
    b. The sentencing and corrections system is out of balance. All of its eggs are in the incarceration basket. Except to the extent required by "just deserts" or public safety considerations, incarceration should be the last option, not the first, and used only to supplement or balance other strategies.
    c. There is a need to put the concept of "corrections" back into the corrections profession, not just the title of the corrections department. This is especially true in light of the positive experience of problem solving courts, and because our prisons are so overcrowded, costly, and ineffective in promoting public safety through either deterrence or rehabilitation strategies.

II. The National Center for State Courts (NCSC) National Sentencing Reform Project: Getting Smarter about Sentencing

1. Recognizing that:
    a. the United States now imprisons a higher percentage of its residents than any other country in the world and that the incarceration rate in eleven of our states exceeds even our national average;

b. the costs of America's over-reliance on incarceration over the last thirty years have been extraordinary and the enormous cost of corrections has drained scarce resources that could be used to address other societal and justice system needs;
c. the significant racial and ethnic disparities in incarceration and the devastating impact of current incarceration policies on our minority communities;
d. U.S. Supreme Court Associate Justice (and Sacramento native) Anthony Kennedy has raised serious concerns about America's over-reliance on incarceration as a criminal sanction in his historic address to the American Bar Association (ABA) in August 2003 ("[o]ur resources are misspent, our punishments too severe, our sentences too long");
e. the resulting ABA Justice Kennedy Commission concluded that "in many instances society may conserve scarce resources, provide greater rehabilitation, decrease the probability of recidivism and increase the likelihood of restitution if it uses alternatives to incarceration," and recommended that "sentencing systems provide appropriate punishment without over-reliance on incarceration as a criminal sanction;"
f. the Kennedy Commission also recommended repeal of mandatory minimum sentencing provisions, use of sentencing commissions and flexible sentencing guideline systems, and elimination of inappropriate racial and ethnic disparities in sentencing,

2. The NCSC's National Sentencing Reform Project mobilizes the collective energy and experience of the judges and administrators of the state courts under the leadership of the state chief justices and state court administrators to promote reform of existing state sentencing policies and practices as recommended by the Kennedy Commission.

3. In order to achieve that goal the project has identified seven specific project objectives:
    a. to reduce reliance on long-term incarceration as a criminal sanction for those not posing a substantial danger to the community or committing the most serious offenses;
    b. to promote the development, funding, and utilization of community-based alternatives to incarceration for appropriate offenders;
    c. to promote greater flexibility and judicial discretion in sentencing policy and practice, including through repeal of mandatory minimum punishment provisions;
    d. to provide greater rationality in sentencing through improved access to and use of relevant data and information in sentencing policy making and practice;
    e. to improve the effectiveness of sentencing outcomes by promoting the use of programs that work, evidence-based practices, and offender risk and needs assessment tools;

f. to promote utilization of sentencing commissions and flexible sentencing guideline systems; and
g. to eliminate inappropriate racial and ethnic disparities in sentencing.

4. Early project activities include:
    a. a recent survey of court leaders regarding current sentencing reform activities in the various states (e.g., in her recent State of the Judiciary Address to the state legislature South Carolina Chief Justice Jean Toal has called for a state summit on sentencing reform: "Sentencing in the United States is a national disgrace. …I will be asking you and the Executive Branch to join in a policy summit to examine this issue.")
    b. a recent national public opinion survey on attitudes about crime and sentencing. Preliminary findings from the survey include the existence of significant public support for: judicial involvement in sentencing reform, doing more to ensure that punishments fit the crime, giving judges more leeway in sentencing, expanded use of alternatives to incarceration, and expanded provision of rehabilitation services—especially for non-violent offenders. This and other public opinion surveys demonstrate that public attitudes about crime and sentencing are not necessarily an obstacle to achieving significant sentencing reform. It is primarily we, the sentencing and corrections policy makers and practitioners, who need to get smarter about sentencing, not the public whom we serve. We are the ones who frequently talk tough, but rarely behave smartly, and don't have the results to show for our current policies when it comes to sentencing and corrections. The public expects leadership from all three branches of state government, as well as from the leaders of the criminal justice system, and they aren't getting it. We can do better.
    c. an upcoming education program with state chief justices and court administrators on evidence-based practices (EBP) in corrections to reduce recidivism. (More on EBP in section V below.)

III. Sentencing and Corrections Reform in California

1. There is a paradoxical and synergistic relationship between meaningful sentencing reform and meaningful corrections reform, and the need to take a holistic approach that coordinates corrections programs at the state and local levels.

2. Corrections Reform: back-end corrections program reforms—such as expanded prison programs to better prepare inmates for re-entry, creation of a guided, discretionary system of parole release, and provision of transitional parole services—have been previously recommended, make good sense, and are long overdue. For the reasons cited below, however, I suggest that the absence of programming in California prisons is not the most critical area of need in California corrections today.

3. Sentencing Reform: consolidation and revision of California Penal and other Code provisions in an effort to simplify California's existing, complex, even "Byzantine" array of sentencing provisions is also probably a good idea even though it may not be welcomed by practitioners, many of whom probably long ago became accustomed to the current nomenclature and committed the codes' current numbering system to memory. But code complexity is not the most important sentencing reform issue facing California. The DSL has been in place for almost 30 years now and for all its complexities major revisions may create more confusion for practitioners, especially in the short term, than the status quo.

4. The most critical area of need in California corrections reform is sentencing reform.
    a. The principal underlying reason why California prisons are overcrowded, cost a lot, and result in high levels of recidivism at the expense of public safety, is that judges are sentencing too many non-violent offenders to prison, and sentencing some of them for too long a term.
    b. One of the two basic reasons why judges sentence too many non-violent offenders to prison, or sentence them to too long a term, is that such sentences are required by California sentencing law. According to December 31, 2005 CDCR Adult Institution Population statistics, for example, the committing offense of 56% of all third strike felons is a non-violent crime.[1]

5. On the other hand, the most important sentencing reform issue facing California is corrections reform. The principal reason (the other basic reason) why judges are sentencing too many non-violent offenders to prison is the absence of effective community corrections programs providing intermediate punishments and necessary and appropriate treatment and rehabilitation services to non-violent offenders.

6. In summary, meaningful corrections reform requires meaningful sentencing reform, and meaningful sentencing reform requires meaningful corrections reform. California can't realize the full benefits of either without pursuing the benefits of both. The related challenge, as discussed in section IV below, is the need for state leadership and financial assistance in developing, expanding, and coordinating corrections programs at the local or community level.

IV. Targeting Non-Violent Offenders

1. Prison beds are a scarce and costly resource and therefore should be reserved for the most serious and dangerous offenders—those for whom punishment through imprisonment is most deserved, and incapacitation is most necessary to protect public safety. But today the committing offense of half of California's prison

[1] Cal. Dept. of Corr., *Second And Third Strikers in the Adult Institution Population*, at Table 1, Second and Third Strikers in the Institution Population by Offense Category, Offense Group and by Type of Conviction (December 31, 2005).

inmates is a non-violent offense.[2] Criminologist Joan Petersilia estimates that 2/3 of these non-violent offenders have never been convicted of a violent offense.[3] Non-violent offenders constitute almost ¾ (72%) of all new commitments, and almost ¾ (74%) of all parolees.[4] Non-violent offenders serve a median of less than 10 months of prison time before being first paroled.[5] Furthermore, a 1994 study found that 62-71% of these non-violent parolees (depending on the nature of the non-violent crime committed) were returned to prison for a new crime or technical violation within three years, indicating the ineffectiveness of current sentencing and corrections practices in reducing recidivism or promoting public safety.[6] Petersilia concludes that the California data suggests an opportunity to target non-violent offenders for alternative community-based intermediate sanctions in lieu of prison:

> These numbers do suggest that California is using resources to send individuals in and out of prison in a way that does not correspond particularly clearly to the seriousness of the risk posed by any given person. A large percentage of Californians who are nonviolent criminals are accumulating very extensive criminal records as a kind of souvenir of the catch-and-release system. Despite their records, they may not be any more dangerous than their counterparts in other states who are left "on the street" and successfully handled through an array of community-based intermediate sanctions.[7]

2. The Little Hoover Commission has previously noted that non-violent offenders are an obvious target population for intermediate punishment programs that can target such offenders either at the initial sentencing stage or after they have been committed to the custody of the CDCR.[8] Although I agree with the Commission's recommendation and observation, I suggest that it makes more sense to target this population for intermediate punishment programs and rehabilitation and treatment services as an alternative to imprisonment in the first place. Offenders will be more amenable at that earlier stage of their criminal careers, and they will face fewer obstacles in transitioning into law-abiding activities than current or former CDCR inmates. Out of custody programming is less expensive, and avoids the commitment and imprisonment costs for those who succeed. It saves CDCR bed

---

[2] Cal. Dept. of Corr., *Prison Census Data as of December 31, 2005*, at Table 3, Prison Census Data Total Institution Population Offenders By Controlling Offense Category And Gender (February 2006).
[3] Joan Petersilia, *Understanding California Corrections*, California Policy Research Center, at 56 (2006)
[4] Cal. Dept. of Corr., *Characteristics Of Felon New Admissions And Parole Violators Returned With A New Term, Calendar Year 2005*, at Table 7, Offense Categories Felon New Admissions; Cal. Dept. of Corr., *Parole Census Data As Of December 31, 2005*, at Table 3, Parole Census Data Total Parole Population Parolees By Controlling Offense Category and Gender (February 2006).
[5] Cal. Dept. of Corr., *Time Served On Prison Sentence Felons First Released To Parole By Offense Calendar Year 2005*, at Table 4: Time Served on Prison Sentence, Felons First Released to Parole during Calendar Year 2005: New Admissions (March 2006)
[6] Petersilia, supra, at 72.
[7] Ibid, at 58.
[8] See, Recommendation No. 9, Little Hoover Commission, Putting Violence Behind Bars: Redefining the Role of California Prisons, Report 124 (January 1994).

spaces for the more dangerous offenders for whom imprisonment is more necessary and more appropriate. Most importantly, such programs and services are more suitably provided at the community level where an offender can maintain contact with family, friends, prospective employers or educational institutions, and other associates, and to which as a former CDCR inmate he would be most likely to return.

3. Although many states currently incorporate intermediate punishment options into their state sentencing systems as an alternative to imprisonment,[9] California currently lacks any state community-based corrections program. As the Little Hoover Commission has also previously noted, the 1990 report of the Blue Ribbon Commission on Inmate Population Management recommended adoption of a Community Corrections Act to provide state funds to localities to significantly expand community based intermediate sanctions options.[10] Although California later enacted a Community-Based Punishment Act establishing a collaborative partnership between state and local governments to create alternative punishment options for prison-bound non-violent offenders at the local level (Penal Code Sections 8050 through 8093), the Act has apparently never been funded.[11] The adverse consequences resulting from the absence of a state community corrections program in California are exacerbated by the fact that the probation function in California is treated solely as a local responsibility as well. California is one of only two states in the nation in which local government is the primary source of probation funding.[12] The State of California's lack of commitment to both community corrections and probationary services, and the resulting ineffectiveness of over-wrought local probation departments in successfully addressing the risks and needs of criminal offenders and reducing offender recidivism, may account for the recent observation that although there is no evidence to suggest that California prisoners are more violent than other state prisoners, they have a far greater number of prior criminal sentences, by any measure, than inmates from other states.[13]

4. In my judgment, California is unlikely to stop the bleeding at the back-end of its sentencing and corrections system without a significant investment at the front end. The root cause of prison overcrowding, run-away costs, and unacceptable rates of inmate recidivism in California is the persistent, unrelenting flood of new offender commitments to CDCR by sentencing judges. The extent of California's

[9] These states include: Arkansas, Delaware, Kansas, Louisiana, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, Utah, and Washington. See, e.g., National Center for State Courts, Sentencing Digest: Examining Current Sentencing Issues and Policies (1998); National Center for State Courts, Sentencing Commission Profiles (1997).
[10] Blue Ribbon Commission on Inmate Population Management, Final Report, January 1990.
[11] The Sacramento Criminal Justice Cabinet, which I chaired in the early 1990's, estimated that 79% of the 1953 adult offenders committed in 1995 to the California Department of Corrections by Sacramento courts qualified as targeted offenders eligible to be housed locally under the legislation.
[12] California Administrative Office of the Courts and California State Association of Counties, Probation Services Task Force: Final Report (June 2003)
[13] Petersilia, Ibid, at 58.

lack of commitment to local and community corrections resources may be unique in the nation. Until California assumes some responsibility for providing leadership and financial assistance to local criminal justice agencies in the development and expansion of community corrections programs and improvement of probationary services, and amends its sentencing statutes to encourage and facilitate use of those resources, even the most diligent and successful efforts to implement back-end solutions are not likely to offer more than temporary and fleeting relief from California's current corrections challenges. A good place to start would be an appropriation of significant funding to implement the Community-Based Punishment Act of 1994.

V. Use of Evidence Based Practices (EBP)

1. Although non-violent offenders are an obvious target population for intermediate punishment programs, offenders should not be selected for participation in intermediate punishment programs based solely on the nature of the primary offense committed but through use of individual offender assessments based on validated risk and needs assessment instruments. In 1994, for example, the State of Virginia created a state sentencing commission charged with developing an offender risk assessment instrument designed to place 25% of those non-violent offenders who would otherwise be incarcerated in alternative sanctions programs. The National Center for State Courts subsequently conducted an independent evaluation of Virginia's risk assessment instrument finding that the instrument successfully predicted the likelihood of recidivism among the diverted offenders and that formal adoption of the instrument for state wide use would provide a net annual financial benefit to the state of about $ 3 million. Based on the National Center's recommendation, Virginia adopted the instrument for state-wide use in 2003.[14]

2. It is also critical that the operation of intermediate punishment programs established as alternatives to imprisonment be based on other "evidence based practices." The Determinate Sentencing Law's (DSL's) exclusive focus on imprisonment for the purpose of punishment may have been consistent with the widespread view in the mid-1970's that efforts to rehabilitate offenders "don't work." A comprehensive 1998 report to Congress funded by the National Institute of Justice, however, reviewed all of the relevant research conducted since the mid-1980's and concluded that rehabilitation programs can effectively change offenders.[15] Building on that earlier report, subsequent research and meta-analyses of research studies have led to the development of principles of "evidence-based practices in community corrections," i.e. practices in community

[14] National Center for State Courts, Offender Risk Assessment in Virginia (2002).

[15] Lawrence W. Sherman, et.al. in collaboration with members of the Graduate Program Department of Criminology and Criminal Justice, University of Maryland, Preventing Crime: What Works, What Doesn't, What's Promising: A Report To The United States Congress Prepared for the National Institute of Justice (1998)

corrections that have been demonstrated by rigorous research "to work," i.e. to reduce offender recidivism.

3. The three basic EBP principles are WHO, WHAT, and HOW: (1) "WHO": the "risk" principle states that the most intensive interventions should be reserved not for low-risk offenders but for offenders with moderate to high probability of reoffending; (2) "WHAT": the "need" principle states that programs should target not just any or all offender needs but "criminogenic," or crime-producing, needs, i.e. factors highly associated with criminal conduct such as anti-social attitudes, anti-social peer associations, substance abuse, and lack of problem-solving and self-control skills; and (3) "HOW": the "treatment" principle states that the most effective programs are behavioral, i.e. consist of action-oriented (rather than talk–oriented) activities centered on the particular circumstances and risk factors that influence a particular offender's behavior and that teach the offender pro-social skills through modeling, practice, and reinforcement.[16]

4. While the research has shown that imposition of criminal sanctions, like imprisonment, is associated with increased recidivism, the National Institute of Corrections and American Probation and Parole Association report that a review of over 150 controlled studies reveals that appropriate treatment based on evidence-based principles and practices is associated with a 30% reduction in recidivism.[17] A number of states are in various stages of adopting evidence-based corrections practices in lieu of incarceration.[18] In 2003, for example, Oregon adopted a statute requiring that in 2005-2007 the Oregon Department of Corrections spend at least 25% of its state "program" funding on "evidence-based programs." The Department is required to spend 50% on evidence-based programs in 2007-2009, and 75% commencing in 2009. The statute defines "evidence-based program" to mean a "treatment or intervention program or service" that "is intended to reduce the propensity of a person to commit crimes," "incorporates significant and relevant practices based on scientifically based research," and is "cost effective."[19]

VI. The Desirability of Establishing a California Sentencing Commission

1. The nature of crime as well as its causes and effects are constantly changing. So too are our values and expectations, and our knowledge of how best to prevent, reduce and punish criminal behavior. Effective sentencing and corrections practices must therefore constantly adapt to change as well. Sentencing and corrections policies must be dynamic.

---

[16] Edward Latessa, *What Works in Reducing Recidivism*, Chapter 6, Texas Intermediate Sanctions Bench Manual (2003)

[17] Mark Carey, Evidence-Based Practice in Corrections (December 2005) (PowerPoint presentation available from the author); see also, D.A. Andrews, An Overview of Treatment Effectiveness (1994)

[18] The states include Arizona, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Minnesota, Missouri, Montana, Ohio, Oklahoma, South Dakota, Virginia, and Washington.

[19] Chapter 669 Oregon Laws 2003

2. California sentencing policy is currently neither dynamic, nor grounded on a policy-making process that provides a thorough, balanced, and informed consideration of all of the relevant evidence and factors. Nor is the policy-making process staffed by an independent, credible, professional, non-partisan entity with the skills and ability to accurately forecast the fiscal, managerial, and programmatic consequences of alternative policy decisions. California's current, more populist processes result in what has been described as "drive-by" policy-making that relies heavily on sensationalized news accounts of extreme criminal behavior, a continually changing array of partisan and term-limited legislators, and not infrequent resort to the initiative process. California would greatly benefit from a sentencing and corrections policy-making process that is long term, non-partisan, less volatile, and grounded in the best and most accurate information, evidence-based practices, and professional judgment available. California also needs to help build a state-wide sentencing information system that links and supplements the many existing independent criminal justice databases to ensure the ability of sentencing judges to make smart sentencing decisions and of policy makers to make smart sentencing and corrections policy decisions.

3. Creation of a permanent, independent, non-partisan sentencing commission with the authority to help build and maintain such an information system and to provide policy advice and guidance to the Governor and Legislature based on reliable and accurate information and evidence-based practices in corrections is the most obvious means to those ends. When jurisdictions across the country began to transition from indeterminate to determinate sentencing structures 30 years ago, California, unlike many states, implemented its new determinate sentencing policy structure solely through legislation, unsupplemented by any administrative policy making or support capability. Having done so almost 30 years ago, and in light of the plethora of sentencing legislation that has been enacted by the legislature and through the initiative process since that time, it may be impractical to consider conversion to a sentencing structure of administratively promulgated sentencing guidelines today. Assuming the California legislature retains primary responsibility for sentencing policy-making, however, based on the experience of other states the policy-making process would nonetheless benefit immeasurably from the presence of a sentencing commission that can recommend policies subject to legislative approval or disapproval, and ensure that the fiscal and programmatic consequences of any proposed policy modification are known and considered. Such a commission can ensure smart, responsible, and accountable policy-making. Existing commissions in other states currently provide these benefits.[20]

[20] See, e.g., National Center for State Courts, Sentencing Commission Profiles (1997).